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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. [redacted] 140

IRVING J. FRIEDBERG, MOLLYE FRIEDBERG AND LEE B. FRIEDBERG, TRADING AS HARRISBURG WINDOW CLEANING CO.,

Appellants,

v.

PENNSYLVANIA LABOR RELATIONS BOARD,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

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PENNSYLVANIA LABOR RELATIONS BOARD,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

This is an appeal from the decision of the Supreme Court of Pennsylvania entered on March 12, 1959 reversing the order of the Common Pleas Court of Dauphin County which had reversed the order of the Pennsylvania Labor Relations Board. Appellants submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal questions are involved.

Opinions Below

Reference to reports of the opinions delivered in the courts below. The opinion of the Supreme Court of Pennsylvania is reported in 395 Pa. 294 (Advanced Sheets) and in the unofficial reports in 148 A. 2d 909 and in 43 LRRM 2717. The opinion of the Court of Common Pleas of Dauphin County is reported in 72 Dauphin County Reporter 127 (Advanced Sheets) and in the unofficial reports in 42 LRRM 2437. The opinion of the Pennsylvania Labor Relations Board is not officially reported and appears in the unofficial reports in 41 LRRM 1152. Copies of the opinions and copy of the order appealed from is appended to this statement and marked Appendix A. (p. 17)

Jurisdiction

Nature of the Proceedings. This action started by the filing of a Petition for Union Certification with the Pennsylvania Labor Relations Board pursuant to the Pennsylvania Labor Relations Act, which in pertinent part is set forth in Appendix B hereto (p. 44). After hearing and election, the Pennsylvania Board certified the Union. The employer (appellants herein) appealed to the Dauphin County Court of Common Pleas which reversed and held that jurisdiction was vested exclusively in the National Labor Relations Board.

Date of judgment. On appeal the Supreme Court of Pennsylvania reversed by decision entered March 12, 1959. Notice of appeal was filed in the Supreme Court of Pennsylvania on June 2, 1959.

Statutory provision believed to confer on the Supreme Court jurisdiction of the appeal. The jurisdiction of the Supreme Court to review this order on appeal is conferred by Title 28, United States Code, Section 1257(2).

Cases believed to sustain the jurisdiction of the Supreme Court. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal: *La Crosse Tel. Corp.* v. *Wisconsin Board*, 336 U.S. 18; *Bethlehem Steel Co.* v. *New York Board*, 330 U.S. 767; *P. S. Guss* v. *Utah Labor Relations Board*, 353 U.S. 1; *Allen-Bradley Local* v. *Wisconsin Employment Relations Board*, 315 U.S. 740.

Statutes Involved

The validity of the Act of Assembly of the Commonwealth of Pennsylvania, Act of June 1, 1937, P.L. 1168, et seq., as amended, 43 PS 211.1 et seq., known as the Pennsylvania Labor Relations Act, particularly Section 7(c) thereof, is involved and drawn into question as being repugnant to the National Labor Relations Act, as amended, 49 Stat. 449 et seq., 61 Stat. 136 et seq., 29 U.S.C. 151 et seq. The pertinent text of both the Pennsylvania Labor Relations Act and the National Labor Relations Act are set forth in Appendix B hereto. (p. 44)

Questions Presented

1. Whether the Pennsylvania Labor Relations Board has the power consistent with the National Labor Relations Act to certify a union as the collective bargaining representative of the employees of a service business (in this case window cleaning) performing a local but a necessary and essential function for twenty-five firms engaged in interstate commerce (inter alia, certificated common carriers in the transportation industry—rail and truck, and manufacturers of products for commerce).

2. In the determination of the "affect" on interstate commerce under the National Labor Relations Act that the window cleaning-service business may have in the event of a labor dispute between the window cleaner and his

employees, is the annual business ($12,162.00) done by the employer for the said firms engaged in interstate commerce the sole criterion and is the burden and obstruction that may occur to the interstate activities of the twenty-five firms served by the window cleaner to be ignored.

3. Is the affect on commerce that may occur in the event of a labor dispute between the window cleaner and his employees *de minimis*.

Statement of the Case

A. The Nature of Appellants' Activities

The factual basis for the position of the employer is that it does the essential and necessary window cleaning service for twenty-five firms found by the Pennsylvania Board to be engaged in interstate commerce (R84a, R88a) [1] which includes, inter alia, some of the largest manufacturers in the United States of their particular products: American Can Company, American Chain and Cable Company, C. H. Masland Rug Company; some of the largest transportation companies in interstate commerce: Pennsylvania Railroad, Railway Express Co., Follmer Trucking; large interstate retail chains: Howard Johnson, Richman Brothers, Morris Jewelers, A. S. Beck Shoes, Martha Washington Candies, Webster Clothes, W. T. Grant; some of the largest national and international publishers: Evangelical Press, Christian Publications; one of the largest national insurance companies: Maryland Casualty.

During 1956, the last complete year prior to the filing of the petition for certification, the employer's business for the firms found by the Pennsylvania Board to be engaged in interstate commerce totaled $12,162.00 (R88a). The

[1] All "R" references are to the Record on Appeal printed for the use of the Pennsylvania Supreme Court.

twenty-five firms found to be engaged in interstate commerce are all located in Central Pennsylvania in which the Dauphin County Court is located and as to which the Dauphin County Court stated: "We can safely assume that the volume (of interstate commerce that might be affected no matter how slightly if a strike were to occur in employer's business) would certainly be great." (R129a)

B. The Nature of the Proceedings

In August 1957 Building Service Employee's International Union filed with the Pennsylvania Labor Relations Board a petition under Section 7(c) of the Pennsylvania Labor Relations Act requesting certification as the collective bargaining agent of the employees of Harrisburg Window Cleaning Co. After hearing and election the Pennsylvania Labor Relations Board certified the Union and the employer appealed to the Court of Common Pleas of Dauphin County which set aside the Board's order. The Pennsylvania Board then appealed to the Supreme Court of Pennsylvania which reversed the order of the Dauphin County Court.

C. The Times, Manner and Methods by Which the Federal Questions Were Raised

Pennsylvania Labor Relations Board. At the time of the hearing before the Pennsylvania Labor Relations Board the employer challenged "the jurisdiction of the Pennsylvania Labor Relations Board" (R26a), filed exceptions to the Board's Nisi Order of Certification in which it again challenged the jurisdiction of the Pennsylvania Board and asserted that employer was solely subject to the National Labor Relations Board:

> "the Pennsylvania Labor Relations Board was without jurisdiction to make or enter said order against

> Employer, whose business (principally window cleaning) affects interstate commerce within the meaning of the 'National Labor Management Relations Act, 1947'." (R97a and R98a)

Court of Common Pleas. In the petition filed by the employer with the Court of Common Pleas of Dauphin County the exclusive jurisdiction of the National Board was asserted and that of the Pennsylvania Board denied:

> "the Pennsylvania Labor Relations Board was without jurisdiction to make or enter the said Nisi Order against the employer, your petitioner, as their business affects interstate commerce within the meaning of the National Labor Relations Act and therefore subject exclusively to the National Labor Relations Act and therefore subject exclusively to the National Labor Relations Board." (R107a and R108a)

Supreme Court of Pennsylvania. In the Supreme Court of Pennsylvania in its Statement of the Question Involved, the employer asserted that "the jurisdiction of the National Labor Relations Board is exclusive" (Appellee's Brief, page 1).

D. The Disposition of the Federal Questions by the Pennsylvania Supreme Court

The Pennsylvania Supreme Court held that "the National Labor Relations Board does not have jurisdiction and hence the Pennsylvania Labor Relations Board was within its authority in making its ruling and orders." Appendix A, p. 17.

The Federal Questions Are Substantial

This case raises a fundamental question of the jurisdiction of the National Labor Relations Board. It raises

an issue—what constitutes a *de minimis* affect on commerce by a local service trade—which has never been decided by this Court. This Court stated the test of jurisdiction, that is, coverage of the National Labor Relations Act, in *National Labor Relations Board* v. *Fainblatt*, 306 U.S. 601 as follows:

> "Examining the Act in the light of its purpose and of the circumstances in which it must be applied we can perceive no basis for inferring any intention of Congress to make the operation of the Act depend on any particular volume of commerce affected more than that to which courts would apply the maxim *de minimis*." Page 607.

In reaching its conclusion that the National Labor Relations Board did not have jurisdiction the Pennsylvania Supreme Court created its own test of "affecting commerce" and ignored the test laid down by the National Labor Relations Act and the United States Supreme Court to determine the volume of commerce affected or that may be affected in the event of a labor disturbance. The Pennsylvania Supreme Court looked only at the $12,162.00 annual business which the employer did for firms engaged in interstate commerce, and held it to be *de minimis*.[2] Said the Pennsylvania Supreme Court addressing itself to the dollar volume of business performed by the employer rather than the volume of commerce that may be affected in the event of a labor dispute: "Here the business of the employer is so small, so trivial, and so insignificant that if the courts do not characterize this business as *de minimis*

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[2] "*De minimis* in the law has always been taken to mean trifles—matters of few dollars or less." *National Labor Relations Board* v. *Suburban Lumber Co.*, 3 Cir., 121 F. 2d 829, 831 (1941), cert. den. 314 U.S. 693.

then that doctrine has no meaning."[3] In so doing the Pennsylvania Supreme Court is in direct conflict with this Court, with the circuit courts and with the National Labor Relations Board.

The issues raised are vital to all service trade industries (not only to the window cleaning industry but also to vast industries such as laundry service, guard service, detective service) whose businesses while local, service firms engaged in interstate commerce. The issue raised is vital to the administration of the National Labor Relations Act and is vital to the jurisdiction of the National Labor Relations Board. The Pennsylvania Labor Relations Board has stated publicly that it is the most important case it has ever decided.

In addition, the Pennsylvania Supreme Court questioned whether window cleaners rendering service to firms engaged in interstate commerce affected interstate commerce by stating—"there seems to be a real question as to whether or not activity of the employer is such that 'affects commerce' "—and therefore casts a serious doubt whether the jurisdiction that the National Board has been asserting over service trades has been proper.

The Pennsylvania Supreme Court in creating its own test

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[3] Even under this erroneous tests of jurisdiction, the Pennsylvania Supreme Court was in error. *Electrical Workers* v. *N. L. R. B.*, 341 U.S. 694, sustained the jurisdiction of the National Board over a labor dispute involving the secondary boycott of a sub-contractor doing $325.00 worth of work (two electricians on the job) on the construction of a $15,200.00 private dwelling. *In N. L. R. B. v. Stoller*, 207 F. 2d 305, the Ninth Circuit, in sustaining the jurisdiction of the National Board (*Richland Laundry & Dry Cleaners*, 93 NLRB 680) where a laundry and dry-cleaning establishment purchased from outside of the state $12,000.00 worth of cleaning supplies annually, said: "The commerce affected—approximately $12,000.00 a year—was not so significant as to come within the rule de minimis non curat lex." The United States Supreme Court denied certiorari, 347 U.S. 919; rehearing denied 347 U.S. 958.

of jurisdiction—its own test for determining the affect on commerce—ignored the test of jurisdiction under the National Labor Relations Act as laid down by the United States Supreme Court. The United States Supreme Court has stated repeatedly that Congress under the National Labor Relations Act has regulated to the full extent of its constitutional power over interstate commerce. "The Act on its face thus evidences the intention of Congress to exercise whatever power is constitutionally given to it to regulate commerce by the adoption of measures for the prevention or control of certain specified acts—unfair labor practices—which provoke or tend to provoke strikes or labor disturbances affecting interstate commerce." *N.L.R.B.* v. *Fainblatt*, 306 U.S. 601, 607.

"The test of the Board's jurisdiction under the act is, not whether the operations of the company constitute interstate commerce, but whether a stoppage of its operations by threatened industrial strike would result in substantial interruption to or interference with the free flow of such commerce. N. L. R. B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 41." *National Labor Relations Board* v. *Baltimore T. Co.*, 4 Cir., 140 F. 2d 51, 54, cert den. 321 U.S. 795. "Congress has explicitly regulated not merely transactions or goods in interstate commerce but activities which in isolation might be deemed to be merely local but in the interlacings of business across state lines adversely affect such commerce." *Polish National Alliance* v. *N.L.R.B.*, 322 U.S. 643, 648. "Given the other needful conditions, commerce may be affected in the same manner and to the same extent in proportion to its volume, whether it be great or small." *N.L.R.B.* v. *Fainblatt*, 306 U.S. 601, 607.

The present jurisdictional standards of the National Board recognize that to determine the affect on commerce the affect on the commerce carried on by the secondary

employer must be considered. In *McAlister Transfer Inc.*, 110 NLRB 1769 the National Board stated:

> "* * * it is *not* the particular business between the the primary employer and the secondary employer at the location affected, but rather the *entire business* of the secondary employer at that location that governs in applying the Board's jurisdictional standards in secondary boycott situations."

Naturally, whether it be representation proceedings, unfair labor practices or secondary boycott proceedings, the jurisdiction of the National Board, the coverage of the National Labor Relations Act, is bottomed on the National Act. The same thought has been expressed as follows: "The term labor dispute (as used in the Natioanl Labor Relations Act) is not limited to those who 'stand in the proximate relation of employer and employee' * * *." *Hehl* v. *Carpenter*, 4 Misc. 2d 629, 91 NW2d 226 (1958).

The circuit courts have likewise held that the affect on the commerce carried on by the secondary employer is a keystone and vital decisional point. In *National Labor Relations Board* v. *United Construction Workers*, 4 Cir., 198 F. 2d 391, cert. den. 344 U.S. 876, the court at page 392 stated:

> "The unfair labor practices consisted in interfering with employees of timbermen who were delivering mine timbers to the Carbon Coal Company, a coal mining company which shipped large quantities of coal in interstate commerce. * * * Without merit also is the contention that the unfair labor practices do not affect commerce because the furnishing of timbers is an intrastate matter. The Carbon Coal Company in the mining and shipping of coal was engaged in interstate commerce on a large scale; and this commerce was

unquestionably affected by the unfair labor practices here involved."

The Pennsylvania Supreme Court thought that the instant case was distinguished from all other cases because it dealt with the sale of *services* rather than the sale of goods. Said the Court: "We are not concerned here with the production of goods by the employer, but rather his activity was a service." That this was the important distinction drawn by the Pennsylvania Supreme Court is shown in a case decided one month later, *Pennsylvania Labor Relations Board* v. *Napoli*, 395 Pa. 301. In the *Napoli* case our case was distinguished as follows: "The facts in the instant case clearly show that the employer's business is quite different from that of the employer in *Friedberg*. Here the employer is engaged in a non-retail manufacturing business while in *Friedberg* the employer was engaged in selling a service * * * these differences are basic in the determination of whether or not an employer is engaged in a activity 'affecting commerce' within the meaning of the national act." P. 305.

That there is no distinction under the National Labor Relations Act between the sale of goods and the sale of services is immediately seen from the numerous cases decided by the National Board where the employer is a seller of services only. That there is no distinction between the sale of goods and the sale of services is also observed from the present jurisdictional standards of the National Board where in the very definition of their jurisdiction they refer to the sale of services. We quote from the present jurisdictional standards of the National Board:

1. Non-retailing: $50,000 outflow or inflow, direct or indirect. Direct outflow refers to goods shipped or *services* furnished by the employer outside the state.

Indirect outflow means sales within the state to users meeting any jurisdictional standard, except solely the indirect inflow or indirect outflow standard. Direct outflow means goods or *services* furnished directly to the employer from outside the state in which he is located. Indirect inflow means the purchase of goods or *services* which originated outside the employer's state but which he purchased from a seller within the state.

4. Instrumentality, links, and channels of Interstate Commerce: $50,000 from interstate (or linkage) part of enterprise, or from *services* performed by employers in commerce.

The decisions of the National Board lay that principal down as their polar star of jurisdiction and apply it to the service industry as was specifically done to a window washing service company. The National Labor Relations Board held that a window cleaning company performing all local intrastate work for companies engaged in interstate commerce was subject to the National Labor Relations Act. *City Window Cleaning Company*, 114 N.L.R.B. 906 (1955). The National Board stated that there was no doubt that a window cleaning company performing window cleaning services for commercial and industrial establishments in the metropolitan Detroit area was engaged in commerce within the meaning of the National Labor Relations Act.

The Pennsylvania Supreme Court stated the "affect" test as follows: "The effect that *unclean windows* will have on commerce pending settlement of the dispute is at most negligible."[4] The Supreme Court of Pennsylvania refused

[4] Cf. *Martino* v. *Michigan Window Cleaning Co.*, 327 U.S. 173, 176, a case arising under the Fair Labor Standards Act (The Wage and Hour Law): "The greater part of this work was done on windows on premises used by respondent's customers in the production of goods for interstate

to consider and give effect to the "affect" that a service trade may have upon interstate commerce in the event of a labor dispute. In doing so the Court stated as follows:

> "The appellee also argued that the *de minimis* doctrine applies to the volume of commerce that is affected and since the employer washes the windows of a building occupied by the Pennsylvania Railroad and several other companies engaged in interstate transportation,[5] that this is not *de minimis* since the volume of business greatly exceeds anything that could even be thought of to be trifles. This is not a valid argument. As has been pointed out before the employer's business was remote and incidental.[6] The appellees urge us to envision a situation where the interstate transportation carried on by these companies is simultaneoulsy tied up because of a labor dispute

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commerce. Under the circumstances of this case the cleaning of the windows of industrial plants by the employees of the respondent is an occupation necessary to the production of the goods produced in those plants." and footnote No. 4 thereto: "See 100 Factory Management and Maintenance, March 1942, p. 101; 74 Architectural Forum, May 1941, pp. 333, 335; 41 National Safety News, March, 1940, p. 88; Balderston, Karabasz and Brecht, *Management of an Enterprise* (1935) p. 145; Conover, *Clean Windows for Safety*, 74 Safety Engineering, Sept. 1937, pp. 13-14; 63 The Foundry, Aug. 1935, p. 89; Randall and Martin, *Making Your Windows Deliver More Daylight*, 22 Transactions of the Illuminating Engineering Society, March 1927, pp. 239-257."

[5] The appellants did the window washing on buildings of twenty-five firms in interstate commerce including, not only certificated common carriers, but those of manufacturers of products for commerce and large receivers of commerce.

[6] The test is not whether the employer's business is remote or incidental as the Pennsylvania Supreme Court held but "whether a stoppage of its operations by threatened industrial strife would result in a substantial interruption to or interference with the free flow of such commerce." *N.L.R.B.* v. *Jones & Laughlin Steel Co.*, 301 U.S. 1. "In determining the constitutional bounds of the authority conferred, we have applied the well-settled principle that it is the effect upon interstate or foreign commerce, not the source of the injury, which is the criterion." *Consolidated Edison Co.* v. *N.L.R.B.*, 305 U.S. 197.

with the instant employer who is an independent contractor. The only situation which could bring about this type of tie-up would be one in which the employer, having a disagreement with his unionized employees, employs nonunion men to perform the work on these various companies windows and the employees in turn were to picket the jobs. Aside from this possibility being very remote, there need not be any tie-up because there is nothing in the record which shows that the railroad and the other companies could not engage another window cleaning contractor, thereby ending any right of employer's union employees to picket these areas." **(Footnotes added by appellants herein)**

The Pennsylvania Supreme Court is directly in conflict with this Court. In *National Labor Relations Board* v. *Bradford Dyeing Association*, 310 U.S. 319, Mr. Justice Black speaking for the Court stated as follows, quoting from page 326 of the opinion:

"• • • and if is not material, as the court below thought, that respondent's customers might be able to secure the same services from other Rhode Island processors if a labor dispute should stop the interstate flow of materials to and from respondent's plant."

And the Pennsylvania Supreme Court is in direct conflict with the circuit courts. In *Cudahy Packing Co.* v. *National Labor Relations Board*, 10 Cir., 118 F. 2d 295 the Court at page 299 of its opinion stated as follows: "The fact that such commerce might be taken over by some other concern may not be considered in determining the jurisdiction of the (National Labor Relations) Board."

In *N.L.R.B.* v. *Western Massachusetts Electric Co.*, 1 Cir., 120 F. 2d 455 the court stated at page 457 of the opinion:

"The jurisdiction of the Board is not defeated by the fact that some of the companies dependent upon

respondent for power might be able to resort to makeshift arrangements or to substituted sources of power so as to minimize any interruptions of commerce that might result from labor difficulties between respondent and its employees."

And to the same effect *N.L.R.B.* v. *Bank of America*, 9 Cir., 130 F. 2d 624, 626 cert. den. 318 U.S. 791 and 792:

"It is immaterial that substitute service might be obtained eleswhere."

Having found as a fact that this window cleaning company performs that service for twenty-five firms themselves engaged in interstate commerce it is respectfully submitted that in the event of a labor dispute between the window cleaner-employer and his employees, the burden and obstruction that would occur ("may" occur is sufficient) to the interstate activities of these twenty-five firms admittedly and found to be engaged in interstate commerce cannot constitute a *de minimis* affect on commerce.

Conclusion

It is submitted that the decision of the Supreme Court of Pennsylvania in establishing an erroneous test of jurisdiction under the National Labor Relations Act does violence to the announced policy of uniformity. "The governing consideration is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy." *San Diego Building Trades Council* v. *J. S. Garmon.* U.S. , 79 S.Ct. 773, 780, 27 LW 4268, 4271.

We believe that the questions presented by this appeal are substantial, are of public interest both in terms of juris-

diction of the National Board and the various State Boards not only over window cleaning services but over all service trades in the nation that perform a local service for interstate commerce, that a plenary consideration by the Supreme Court should be ordered.

Respectfully submitted,

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APPENDIX

APPENDIX A

Copies of the opinions and copy of the order appealed from.

Opinions of the Pennsylvania Labor Relations Board
(Reported unofficially at 41 LRRM 152)

On October 3, 1957, the Board issued its Nisi Order certifying Building Service Employee's International Union, Local No. 363, AFL-CIO, herein called the "Union", as the exclusive representative of the employes involved in this case. On October 9, 1957, the Employer filed exceptions to the Nisi Order, and on October 15, 1957, pursuant to due notice, the Board heard oral argument on the exceptions. The Employer and the Union were present at the argument and were heard. On October 15, 1957, the Employer filed a brief in support of its exceptions, and on October 18, 1957, the Employer filed a supplemental brief.

In its exceptions, the Employer makes two points: (1) that the Board has no jurisdiction over the Employer and (2) that the appropriate unit should not be limited to the employes of Harrisburg Window Cleaning Company but should include the employes of two other concerns. The Employer has raised these questions from the outset of this case, and the Board has heretofore determined the issues adversely to the Employer's contentions. The Board sees no reason to depart from the views it has previously expressed. However, because of the importance of the jurisdictional question and the earnestness with which the Employer presents its position, the Board deems it desirable to clarify its position in this case.

First, as to jurisdiction. The Employer furnishes a window cleaning service, and employs five persons to do this work. Its total business for the year 1956 amounted to $40,165.70, of which $12,162.00 represented services performed for enterprises engaged in interstate commerce. Some of the latter concerns were engaged in transportation, like the Pennsylvania Railroad Company and the Railway Express Company, and others were engaged in

the production of goods for interstate commerce, like the American Can Company, American Chain and Cable Company, and the C. H. Masland Rug Company. However, a number of the concerns represented in the $12,162.00 figure were retail establishments like Morris Jewelers, Hermann's Shoe Store, and Adeline Shops. It is admitted that the balance of the 1956 business, amounting to $28,003.70, was performed for intrastate customers.

The Supreme Court of the United States in Guss etc. v. Utah Labor Relations Board, 353 U. S. 1 (1957), and companion cases, definitely established that the several States may not exercise jurisdiction over the labor relations activities of employers who are subject to the jurisdiction of the National Labor Relations Board. Our Supreme Court applied this principle in Hodges Bedding Company v. Pennsylvania Labor Relations Board et al., 388 Pa. 333 (1957). And whatever doubts this Board may have had about the applicability of the National Labor Relations Act to a local employer who furnishes a window cleaning service to customers, some of whom are engaged in interstate commerce, seem to have been set at rest by Martino v. Michigan Window Cleaning Co., 327 U. S. 173 (1946) and City Window Cleaning Company, 114 N.L.R.B. 906 (1955).

But these authorities do not dispose of the matter now before this Board. Aside from the possibility that Martino and City Window Cleaning can be distinguished from the instant case, the Board is firmly convinced that the business of the Employer here is not subject to Federal jurisdiction,[1] and that the impact of the Employer's business upon interstate commerce is fanciful, remote, and so negligible as to satisfy fully the well established doctrine de minimis non curat lex. Mr. Justice Stone made it clear in National Labor Relations Board v. Fainblatt et al., 306 U. S. 601, 607 (1939), one of the landmark jurisdictional cases, that there was ". . . no basis for inferring any

[1] There is no doubt, of course, that the business of the Employer does not merely meet the "jurisdictional yardstick" test of the National Labor Relations Board, and that that Board would not in any event assert jurisdiction over the Employer.

intention of Congress to make the operation of the (National Labor Relations) Act depend on any particular volume of commerce affected more *than that to which courts would apply the maxim de minimis.*" (Emphasis supplied)

The Board is familiar with the various Federal decisions involving the jurisdiction of the National Labor Relations Board, and does not intend here to analyze those decisions. The Board does not believe that the U. S. Supreme Court has yet established what is de minimis for the purposes of the National Labor Relations Act. What the Board believes is that the business of a local window cleaning establishment, whose receipts from customers engaged in interstate commerce, especially such customers as are involved in this case, amount to only $12,162.00 a year, is de minimis under the law. For that reason, the Board has asserted jurisdiction in this case. If the Board should be proven wrong, state labor relations boards might just as well go out of business.

The unit question is quite simple. Guarantee Window Cleaning Company and Harrisburg Office Maintenance Company are engaged in much the same work as the Employer. Two of the partners of the Employer own and operate these other companies and the third partner is active in their management. It is clear from the facts in the record that the employes of the three companies could together constitute an appropriate unit if some union sought such a unit or if there was a history of collective bargaining for such a unit. But the three companies are distinct and the employees of each prima facie constitute an appropriate unit. The Union does not seek a multi-employer unit and there is no history of collective bargaining for such a unit. Under such circumstances the authorities are clear that the unit found appropriate in this case is correct.

IN THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY, PENNA.

No. 1151

September Term, 1957

PENNSYLVANIA LABOR RELATIONS BOARD

vs.

IRVING J. FRIEDBERG, MOLLYE FRIEDBERG AND LEE B. FRIEDBERG, TRADING AS HARRISBURG WINDOW CLEANING CO.

OPINION

By The Court:

This matter comes before us by way of a Petition For Review of the final order of the Pennsylvania Labor Relations Board, dated November 21, 1957, certifying Building Service Employee's International Union Local #363, AFL-CIO (hereinafter called "union"), as the exclusive representative of the employees of the appellant, Irving J. Friedberg, Mollye Friedberg and Lee B. Friedberg, trading as Harrisburg Window Cleaning Co. (hereinafter called "employer").

The appellants are partners engaged in the business of window cleaning in and about the City of Harrisburg, Pennsylvania, with their principal place of business at 120 South Second Street, in Harrisburg, and while it appears that the greater part of their business artivities as Harrisburg Window Cleaning Co. are carried on in the City of Harrisburg, or in Dauphin County adjacent thereto, there is some evidence that perhaps the business extends into a neighboring county. In any event, it can be assumed from the entire record that the employer is engaged locally in the service of window cleaning. The windows on approximately twenty-five buildings serviced by this employer are windows of premises occupied by persons engaged in interstate commerce.

Irving J. Friedberg and Mollye Friedberg, his wife, but without the son, Lee B. Friedberg, also own and operate

another window cleaning business in and around the City of Harrisburg under the name of Guarantee Window Cleaning Co. This business is operated from the same office from which the Harrisburg Window Cleaning Co. is operated, and it deals in the same type of service.

There is a third business in which Irving J. Friedberg and Mollye Friedberg, his wife, alone are the owners and operators, conducted from the same address, and this business, known as Harrisburg Office Maintenance Company, is engaged principally in janitorial services.

Pursuant to Pennsylvania Labor Relations Act, 1937, June 1, P. L. 1168 (43 P. S. 211.1 et seq.) the Pennsylvania Labor Relations Board, after there had been filed with it a position by the union, and after having had a hearing thereon, found that the employees of the Harrisburg Window Cleaning Co. (excluding supervisors) were a unit appropriate for the purposes of collective bargaining, and ordered an election to determine who should be the exclusive representative of the unit.

After the election was duly had, the board on October 3, 1957, handed down its nisi order of certification, certifying the hereinbefore named union as the exclusive representative of the employees of Harrisburg Window Cleaning Co. for the purposes of collective bargaining with the employer.

The employer in its Petition For Review raises two questions, both of which were raised by it at the outset of these proceedings and repeated throughout. These then are the two questions before us in these proceedings:

1. Does the business of this employer affect interstate commerce within the meaning of the National Labor Relations Act, and therefore, deprive the Pennsylvania Labor Relations Board of jurisdiction?
2. Are the employees of Harrisburg Window Cleaning Co. (excluding supervisors) an appropriate unit for the purposes of collective bargaining?

The Harrisburg Window Cleaning Co. employs approximately five window cleaners and a supervisor, and Guarantee Window Cleaning Co. employs approximately the same number of window cleaners and a clerk. The son, Lee B.

Friedberg, while not being an owner in the latter company, is apparently the manager of both companies. Both businesses operate from the same office at 120 South Second Street, Harrisburg, Pennsylvania, and are engaged in the same type of work, that of window cleaning in the City of Harrisburg and vicinity. The skills of the employees in both companies are the same, the rate of pay and the method of pay are the same, the work is of the same type, and the employees use the same type of tools. They work approximately the same hours, and under the same conditions. At times the employees of the one company work with the employees of the other company on the same building, but generally the companies are separate operating units, and work on different buildings.

The third company, Harrisburg Office Maintenance Company, is engaged in janitorial services, employing some fifteen men. All three companies are partnerships and operate under fictitious names.

The record does not show how many different customers have their windows cleaned by the employer, Harrisburg Window Cleaning Co., but it does show that for the calendar year 1956, the gross business of this company was $40,165.70, and of this amount $12,162.00, or better than 30 percent, was the result of work performed for some twenty-five individuals or businesses which were engaged in one way or another in interstate commerce. Some of these customers, like the Pennsylvania Railroad, the Railway Express Company and Follmer Trucking Company were directly a part of interstate commerce; perhaps a half dozen others were engaged in producing goods for interstate commerce; and the balance were retail outlets for goods which had previously been in interstate commerce.

On August 19, 1957, the union filed its petition with the Pennsylvania Labor Relations Board requesting investigation and certification of a representative of the employees of the Harrisburg Window Cleaning Co. alone under § 7 (c) of the Pennsylvania Labor Relations Act. A hearing was held on September 10, 1957, and thereafter on September 24, 1957, the board, finding that the employees of Harrisburg Window Cleaning Co. were an appropriate bar-

gaining unit, directed that an election be held to determine whether or not the union should be elected the exclusive representative for the employees. The election was duly had on October 1, 1957, and then on October 3, 1957, the Board certified the said union as representative. Exceptions to the board's order were duly filed by the employer, again raising the question of jurisdiction, and the question of whether or not the employees of Harrisburg Window Cleaning Co. alone were an appropriate unit for collective bargaining.

After oral argument the board handed down its final order on November 21, 1957, dismissing the exceptions, and the employer thereafter on December 3, 1957, filed its Petition For Review to this court.

We will discuss first in this opinion the question of whether or not the employees of Harrisburg Window Cleaning Co. were an appropriate unit under the Pennsylvania Labor Relations Act, supra.

This question gives us very little difficulty, for under the Pennsylvania Labor Relations Act, supra (43 P. S. 211.7 (b)), it is provided:

> "*The board shall decide*[2] in each case whether, in order to insure to employes the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this act, the unit appropriate for the purposes of collective bargaining shall be the *employer unit*, craft unit, plant unit, or *sub-division* thereof . . . ."

and under § 211.9 (b) providing for judicial review of actions of the board:

> ". . . the findings of the board as to the facts, if supported by substantial and legally credible evidence, shall . . . be conclusive."

In the *Duquesne Light Company Case*, 345 Pa. 458 (1942), the employees of one power station of the company were held to be an appropriate unit for the purposes of colle-

[2] Emphasis throughout ours.

tive bargaining, even though the company had two other power plants, and even though as the court points out, there may have been strong evidence to support a different unit. It might well be as the employer here suggests, that the employees of both Harrisburg Window Cleaning Co. and Guarantee Window Cleaning Co. together, or perhaps even the employees of these two companies, plus the employees of Harrisburg Office Maintenance Company would be an appropriate unit, and it might be the judgment of the court that a different unit than the one designated by the board should be preferred, but nevertheless, we are bound by the provisions of the law, and after a careful reading of the entire record, we must conclude that here as in the *Duquesne Case*, there is substantial legally credible evidence to support the findings, and that the board's action in designating this unit was certainly not arbitrary or capricious, and therefore, we believe that this would be an appropriate unit. See *Chapin* v. *Pennsylvania Labor Relations Board*, 356 Pa. 577 (1947); *Pennsylvania Labor Relations Board* v. *Kaufmann Department Stores, Inc.*, 345 Pa. 398 (1942); and *Pennsylvania Labor Relations Board* v. *Henry*, 361 Pa. 565 (1949).

However, in view of our conclusion on the question of jurisdiction, the question of the appropriate unit loses its importance in this case.

As to that question, we have examined all of the authorities cited by both the employer and the board, and many others not cited by either party, but believed by the court to shed some light on the matter before us, and we have concluded that the Pennsylvania Labor Relations Board lacks jurisdiction.

The National Labor Relations Act of July 5, 1935, c. 372, § 1, et seq., 49 Stat. 449 (29 U.S.C.A. 151 et seq.) as amended by Labor Management Relations Act, June 23, 1947, C. 120 § 1, 61 Stat. 136 (29 U.S.C.A. 141 et seq) sets forth a complete and exclusive means of regulating the labor relations of persons, industries and unions in activities "affecting commerce"; and § 9 of that Act (29 U.S.C.A. 159) provides for the designation of "the unit appropriate for the pur-

poses of collective bargaining", as far as here applicable, in these words:

> "The Board shall decide in each case whether, [in order to insure to employees the fullest freedom in exercising the rights guaranteed by this sub-chapter,] the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof * * *. (Brackets supplied).

The Pennsylvania Labor Relations Act in the comparable provision (43 P. S. 211.7) provides:

> "The Board shall decide in each case whether, [in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this act,] the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof * * *." (Brackets supplied).

The provision in the National Labor Relations Act concerning the designation of representatives for collective bargaining is identical with the provision in the Pennsylvania Labor Relations Act, as far as we are concerned with it in this case, in these words:

> "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer * * *."

29 U.S.C.A. §159 (a) and 43 P. S. 211.7 (a).

It can thus be seen that both the Federal Act and the State Act provide practically identical protection to the employees in the designation of an appropriate bargaining unit and in the certification of the exclusive representative of the employees.

The question then arises, can both of these Acts be effective in any one case, or must the one give way to the other?

In *Food, Tobacco, Agricultural and Allied Workers Union of America*, Local 186 v. *Smiley*, 164 F. 2d 922 (1947) the Third Circuit Court of Appeals had before it a case involving the certification of an exclusive collective bargaining agent in which the employer was admittedly in interstate commerce. The Pennsylvania Labor Relations Board had been enjoined from certifying such an agent on the ground that, as the union claimed, the jurisdiction should be under the National Board. The Pennsylvania Board urged the appellate court to hold that there should here be concurrent jurisdiction, but the court rejected the Pennsylvania Board's contention and held that there could be no concurrent jurisdiction in this case, and cited the case of *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U.S. 767 (1947) and *Pittsburgh Railways Company Substation Operators and Maintenance Employees' Case*, 357 Pa. 379 (1947).

In the *Bethlehem Steel Co.* Case, the foremen of the employer filed an application with the New York State Board for certification as a bargaining unit at a time when the National Board was refusing to recognize foremen as a class for such units. The employer was a manufacturing company in the State of New York, but "affected" interstate commerce. The New York State Labor Relations Act had been patterned after the National Act in much the same way that the Pennsylvania Act had been patterned after the National Act, and for the purposes of the *Bethlehem Case* was conceded to be practically the same as the National Act, and so the question was clear that since both Acts concerned the same relationship, and since the federal regulating body would not then recognize foremen as a class, could the state agency do so. It appeared that there could be no conflict because the Federal Board had volun-

tarily refused to recognize foremen as a unit appropriate for the purposes of collective bargaining. Mr. Justice Jackson speaking for the majority held at page 176, that the state could not regulate, in these words:

> "If the two boards attempt to exercise a concurrent jurisdiction to decide the appropriate unit of representation, action by one necessarily denies the discretion of the other. The second to act either must follow the first, which would make its action useless and vain, or depart from it, which would produce a mischievious conflict."

Our own State Supreme Court in *The Pittsburgh Railway Co. Case* denied that concurrent jurisdiction exists between the two boards. In that case, the union filed its petition with the Pennsylvania Board asking that a unit of substation operators be designated as a unit appropriate for the purposes of collective bargaining, and that the union be certified as the bargaining representative. The Pennsylvania Board took jurisdiction and found that a craft unit was proper and then certified a different union as the bargaining representative. On appeal to the Supreme Court of Pennsylvania, the question of jurisdiction of the State Board was raised because at that point in the proceedings the *Bethlehem Case*, supra, was pending in the Federal Courts. The employer was admittedly engaged in interstate commerce within the meaning of the National Labor Relations Act, and therefore, the selection of and determination of an appropriate bargaining unit and the certification of a representative for the purposes of collective bargaining was within the jurisdiction of the National Board. The Pennsylvania Board had contended that, nevertheless, jurisdiction for this purpose did not vest *exclusively* in the National Board, but was concurrent, and that the exercise of state power could be suspended only when the issue presented had been before the National Board, or where the State Board enforced a policy at variance with or repugnant to that of the National Labor Relations Board. The Pennsylvania Supreme Court rejected this position of the Pennsylvania State Board, and citing

National Labor Relations Board v. *Fainblatt*, 306 U.S. 601, 59 Sup. Ct. 668, Justice Patterson said at page 383:

> "Jurisdicton of this Board [National] extended not merely to those industries directly engaged in interstate commerce or in production or manufacture of goods destined to use interstate channels for distribution, but also to those which, admittedly local and interstate, had a close and substantial relation to interstate commerce and whose regulation was necessary to maintain conditions under which interstate commerce may be conducted without molestation or hindrance."

and at page 385 the court held:

> "The issue,—determination of the collective bargaining unit and collective bargaining agent,—represents a basic and fundamental part of the Congressional regulation. Congress, having exercised its power, did not intend to permit state action with regard thereto."

To the same effect is *La Crosse Telephone Corp.* v. *Wisconsin Employment Relations Board*, 336 U.S. 18 (1948), wherein it was also held that the certification of a collective bargaining agent by the State Board was such a final order as could be appealed to the courts.

It appears clear therefore, that if the employer in the instant case is affecting commerce within the meaning of the National Labor Relations Act, then even though by the terms of the statute it may seem that the Pennsylvania Board would have jurisdiction, such jurisdiction will have to give way to the National Board.

The words "affecting commerce" have been held to have the widest possible meaning. In the *National Labor Relations Board* v. *Suburban Lumber Co.*, 121 F. 2d 829 (1941), it is said at page 831:

> "The National Labor Relations Act uses what have been described as words of art to indicate the fullest employment of this Congressional authority. The selection of the word '*affect*' is of recent origin. Although it appears in the language of some of the earlier Su-

preme Court opinions, it only found its way into relatively new legislation; and so is not present in such statutes as the Federal Trade Commission, the old Employers' Liability Act, and the Sherman Act. They qualify interstate commerce with such words as 'in', 'engage in' or 'restraint', whereas such modern statutes as the National Labor Relations Act, the Bituminous Coal Act, and the new Employers' Liability Act prefer the more vehement 'affect'. That the word has the widest conceivable scope is apparent both from its dictionary definition and its judicial interpretation. The dictionary says: 'To act upon; produce an effect on; touch', and the cases are equally unanimous in emphasizing this inclusive character and so hold it to mean 'acting upon', 'working a change in' or 'concerning'."

See also *Polish National Alliance of the United States of North America* v. *National Labor Relations Board*, 322 U.S. 643.

It has long been recognized that the term "commerce" does not merely mean the movement of goods, but it embraces commercial intercourse in all its branches, *Second Employers' Liability Case*, 223 U.S. 1, (1911); and that in the regulation of interstate commerce it frequently becomes necessary for Congress to regulate some aspects of purely intrastate commerce, *Houston, East and West Texas Railway Company* v. *United States*, 234 U.S. 342 (1913); *National Labor Relations Board* v. *Fainblatt*, supra.

The fundamental principle is that the power to regulate commerce is the power to enact all appropriate legislation for its protection and advancement, and although activities may be intrastate in character when separately considered, when they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197.

One of the leading cases on the extension of the commerce doctrine is the *Fainblatt Case*, supra, in which the respondent manufactured women's sport garments in New Jersey under a contract with Lee Sportswear of New York. The raw materials came to the factory from outside of New Jersey, but the manufacturing was all completed in that state, and the finished products were delivered to Lee Sportswear in New Jersey. A strike occurred in the plant and when the question of unfair labor practice was raised, the jurisdictional question became important. The court held that the National Board had jurisdiction, Justice Stone saying at pages 604 and 605:

> "* * * an employer may be subject to the National Labor Relations Act although not himself engaged in commerce. * * * Long before the enactment of the National Labor Relations Act it had been many times held by this Court that the power of Congress extends to the protection of interstate commerce from interference or injury due to activities which are wholly intrastate."

The Pennsylvania Labor Relations Board argues that because the employer company is small, the National Board does not have jurisdiction, but this does not appear to us to be the law.

Justice Stone in the *Fainblatt Case*, supra, states at page 606:

> "The language of the National Labor Relations Act seems to make it plain that Congress has set no restrictions upon the jurisdiction of the Board to be determined or fixed exclusively by reference to the *volume of interstate commerce involved.*"

and at page 607:

> "Given the other needful conditions, commerce may be affected in the same manner and to the same extent in proportion to its volume, whether it be great or small. *Examining the Act in the light of its purpose and of the circumstances in which it must be applied we can perceive no basis for inferring any intention*

of Congress to make the operation of the Act depend on any particular volume of commerce affected more than that to which courts would apply the maxim de minimis."

The *Fainblatt Case* has been followed in many cases and cited with approval by many courts.

In *National Labor Relations Board* v. *Gulf Public Service Co.*, 116 F. 2d, 852, the service company was engaged exclusively in furnishing light and power intrastate in the State of Texas, but some of the companies to whom it furnished service were doing interstate business. There were only twenty-four employees involved, but nevertheless, the court held that the business of the company affected interstate commerce, and that therefore, the National Board prevailed. The court, admitting that the direct affect on interstate commerce would be comparatively infinitesimal, stated, that nevertheless, it could not hold that a labor disturbance in the company would have *no* direct affect, and said at page 854:

"* * *, the Congress fixed no standard of degree by the use of which it can be said, as a matter of power rather than of wise policy, that a particular amount of probable direct interference with interstate commerce is too little to come within its cognizance. Congress undoubtedly had the power to bring within the field of Congressional supervision, all direct interference with interstate commerce, no matter how slight."

In *Abbotts Dairies, Incorporated, Case*, 341 Pa. 145, (1941), where the question was whether the State or National Board had jurisdiction, it was held that even though only 12.9 percent of the total business of the company involved interstate transactions, and even though all of the employees involved in the labor dispute were performing intrastate duties, that of the local delivery of milk, nevertheless, commerce was affected, and the National Board had jurisdiction.

We have found several cases in the lower federal courts, where the doctrine of de minimis was applied to oust the

National Board's jurisdiction, but these cases all involved a very small percentage of the company's business in interstate commerce.[3] On the other hand, in *Southern California Freight Lines* v. *McKeown*, 148 F. 2d 890, where an employee spent only 7 percent of his time with bills of lading and invoices dealing with interstate commerce shipments, it was held not to be de minimis under the Fair Labor Standards Act; and in *Wood* v. *Central Sand & Gravel Co.*, 33 F. Supp. 40, 15 percent to 20 percent of the total sales of a company was held to be substantial and not de minimis.

It will be remembered that in the instant case more than 30 percent of the employer's business involves customers who are in some manner engaged in interstate commerce, and that the gross income of employer from such business is $12,162.

The doctrine of de minimis has generally meant to us *trifles*, a few dollars more or less, and here in the instant case we are dealing with several thousand dollars of gross interstate business, and a substantial percentage of the employer's total gross income. Standing by itself, we would conclude that this is not de minimis, but here we should go further. The Fainblatt Case holds that the National Act applies unless the "*volume of commerce affected*" would come under the de minimis doctrine. The record in the present case fails to show the volume of commerce of the Pennsylvania Railroad or the Railway Express Company, or the other customers of employer that might be affected no matter how slightly if a strike were to occur in employer's business. We can safely assume that the volume would certainly be great.

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[3] In *James Reuter, Inc.* v. *Walling*, 137 F. 2d 315, 5% of defendant's total sales of fresh fruit and vegetables moved in interstate commerce; in *Hill* v. *Jones*, 59 F. Supp. 569, 1% of the company's total sales moved in interstate commerce; in *Spier* v. *Gulf Coast Beverages*, 50 F. Supp. 653, 1.004% of defendant's production of soft drinks moved in interstate commerce; in *Rauhoff* v. *Henry Gramling & Co.*, 42 F. Supp. 754, ½ of 1% of the dollar volume of the company's business moved in interstate commerce; and in *Goldberg* v. *Worman*, 37 F. Supp. 778, 3% of defendant's bakery business moved in interstate commerce. All of these cases were held to be de minimis.

It is our judgment that although the dollar volume of employer's business may be small, and the number of employees involved few, nevertheless, the facts of the present case do not bring it within the de minimis rule, and thus deprive the National Board of jurisdiction under the authority of the Fainblatt Case.

Three cases dealing with building maintenance employees under the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U.S.C.A. §201 et seq., came before the United States Supreme Court between 1940 and 1945: *Kirschbaum v. Walling*, 316 U.S. 517; *10 East 40th Street Building, Inc. v. Callus*, 325 U.S. 578; and *Borden Co. v. Borella*, 325 U.S. 679.

Under the Fair Labor Standards Act, for federal jurisdiction to attach, the employee must be "engaged in commerce or in the production of goods for commerce", and it is further provided in that Act that "an employee shall be deemed to have been engaged in the production of goods if such employee was employed . . . in any process or occupation necessary to the production thereof, in any State." Under the National Labor Relations Act, with which we are here concerned, federal jurisdiction, as we have seen, attaches when the employer is in an industry "*affecting* commerce"—a much broader concept.

The employees in the *Kirschbaum Case* were engaged in the operation and maintenance of a building in which large quantities of goods for interstate commerce were produced by the tenants of the building. The employees in question were the elevator operators, the watchmen, the electricians and porters, and their duties, among other things, were to keep the building clean and habitable, and furnish the tenants with light. The court held that the work of these employees had such a "close and immediate tie with the process of production for commerce, and was therefore, so much an essential part of it, that the employees are to be regarded as engaged in an occupation 'necessary to the production of goods for commerce'".

The *Kirschbaum Case* was followed by the *10 East 40th Street Building Case*, which did not find a "close and immediate tie with the process of production" when the build-

ing maintenance employees were engaged in similar duties in a New York office building, which was a typical office building housing a great variety of tenants, some of which, incidentally, produced goods for commerce.

In the *Borden Co. Case* the maintenance employees of the building owner were held to be under the Fair Labor Standards Act even though this too was an office building, but the owner of the building was elsewhere engaged in the manufacture of goods for commerce, and more than half of the rentable space of the building was used for the central offices of the Borden Co.

The *Kirschbaum Case* and the *Borden Co. Case* seem to us to be analogous to the proposition that window cleaners in the instant case would "affect commerce" within the meaning of the National Labor Relations Act, and the *10 East 40th Street Building Case* is distinguishable on its facts from the other two cases.

A case under the Fair Labor Standards Act which dealt solely with window cleaners was *Martino* v. *Michigan Window Cleaning Co.*, 327 U.S. 173 (1945) in which the respondent was engaged in window cleaning in the City of Detroit. The greater part of the work was done for respondent's customers on premises used for the production of goods for interstate commerce, some of the customers being actually engaged in interstate commerce on the premises. The court, speaking through Justice Burton, said at pages 176 and 177:

> "Under the circumstances of this case the cleaning of the windows of industrial plants by the employees of the respondent is an occupation necessary to the production of the goods produced in those plants. If the services rendered in this case had been rendered by the employees of respondent's customers engaged in the production of goods for interstate commerce, those employees would have come under the Act."

We feel that if the employees of the *Martino Case* are engaged in an occupation necessary to the production of goods for commerce, then certainly the employees in

the instant case are engaged in an industry affecting commerce.

In *Butler Bros.* v. *National Labor Relations Board*, 134 F. 2d 981, and *National Labor Relations Board* v. *Dixie Terminal Co.*, 210 F. 2d 538, building maintenance employees were found by both the Sixth and Seventh Circuit Courts of Appeal to be subject to the jurisdiction of the National Board under the National Labor Relations Act as businesses engaged in industries affecting commerce, when the tenants are in the interstate commerce. In both of these cases certiorari was denied by the United States Supreme Court. In the *Butler Case* some of the employees were window cleaners and others were elevator operators, watchmen and janitors. When the question of whether Butler Bros., who owned the building, or one Alex Wasleff, who had a contract with Butler Bros. for maintenance, was the employer in this case, the Circuit Court of Appeals said that it made no difference. At page 983, the court said:

> "It is at once apparent, so we think that the services of such employees are so closely associated, if not directly connected, with the flow of interstate commerce as to be entitled to the protection of the Act. (citing cases).
>
> This is so whether they be regarded as employees of petitioner [Butler Bros.] or Wasleff. There is no dispute but that Wasleff is engaged in the business of performing janitor, watchman, doorman, elevator and *window cleaning service* in numerous buildings owned and operated by various concerns solely in the city of Chicago. This in itself, however, does not, in our judgment, alter the status of the employees or the character of the business in which they are engaged. Otherwise, we would have the anomalous situation of two sets of employees, one those of petitioner and the other those of Wasleff, both performing the same character of services, one entitled to the protection of the Act and the other not. The flow of commerce is affected or may be affected in the same manner and to the same extent, regardless of whether the employees are those of petitioner or Wasleff."

The Dixie Case is to the same effect, and there the court said at page 539:

> "In our opinion, the work of respondent's employees, although local in nature, had such a relationship to the interstate business of the tenants as to affect commerce. A labor dispute involving such employees would tend to burden or obstruct the free flow of commerce of the tenants therein."

Our attention has been called to only one case under the National Labor Relations Act where the business of window cleaning alone was involved, and an independent search reveals no other such cases. That was the case of *City Window Cleaning Co.*, 114 N.L.R.B. 906, and there the National Labor Relations Board held that without any doubt, window cleaners in the City of Detroit, Michigan, were engaged in interstate commerce within the meaning of the Act, when their customers shipped commodities to points outside Michigan, and that, therefore the National Labor Relations Board had jurisdiction with respect to unfair labor practices therein. While this case apparently never was appealed to court, it is a clear indication that the National Board feels that window cleaners are subject to the Act.

Although the amount of interstate commerce was not raised in either the *Butler Case* or the *Dixie Case*, it has been contended that the National Labor Relations Board has imposed upon itself a dollar limitation under which it will not take cognizance of a labor matter otherwise within its jurisdiction, and that because of this fact, if we find here that the Pennsylvania Labor Board does not have jurisdiction, then this matter will be in that area in which there is no regulation of the labor relations of the parties, and with that contention we agree. But under the authority of the decisions of the highest court of the land, that can makes no difference in this decision.

As recently as 1956, Chief Justice Warren in the case of *Guss v. Utah Labor Board*, 353 U.S. 1, in which the National Board had declined to take jurisdiction because of its self-imposed dollar limitation, said at page 10:

"We are told by appellee that to deny the State jurisdiction here will create a vast no-man's land, subject to regulation by no agency or court. We are told by appellant that to grant jurisdiction would produce confusion and conflicts with federal policy. Unfortunately, both may be right. We believe, however, that Congress has expressed its judgment in favor of uniformity. Since Congress' power in the area of commerce among the States is plenary, its judgment must be respected whatever policy objections there may be to creation of a no-man's-land."

As Chief Justice Warren points out in the *Guss* case, the area of "no-man's-land" can be greatly reduced by the National Labor Relations Board by ceding jurisdiction to the states under § 10 (a) of the National Labor Relations Act, or Congress itself can change the situation by appropriate amendments.

See also *Hodges Bedding Co. v. Pennsylvania Labor Relations Board*, 388 Pa. 333 (1957) which followed and cited the *Guss Case*, supra, and its companion cases *Amalgamated Meat Cutters and Butcher Workmen of North America, Local No. 427, AFL v. Fairlawn Meats, Inc.*, 353 U.S. 20; and *San Diego Building Trades Council v. Garmon*, 353 U.S. 26.

It is our judgment that the Pennsylvania Labor Relations Board does not have jurisdiction in this case, and therefore, the order of the board must be set aside. We therefore make the following

ORDER

AND NOW, to wit, this 14th day of July, 1958, it is ORDERED AND DECREED that the order of the Pennsylvania Labor Relations Board dated October 3, 1957, affirmed and made absolute by the board's order dated November 21, 1957, be set aside.

R. DIXON HERMAN,
Judge.

IN THE SUPREME COURT OF PENNSYLVANIA

Middle District

Nos. 8 and 9 May Term, 1959

PENNSYLVANIA LABOR RELATIONS BOARD, APPELLANT,

v.

IRVING J. FRIEDBERG, MOLLYE FRIEDBERG AND LEE B. FRIEDBERG, TRADING AS HARRISBURG WINDOW CLEANING CO.

Appeals from the Orders of the Court of Common Pleas of Dauphin County at No. 1151 September Term, 1957, and No. 455 January Term, 1958.

OPINION OF THE COURT

Filed: March 16, 1959

Cohen, J.

The appeals herein were taken by the Pennsylvania Labor Relations Board from a decision of the Court of Common Pleas of Dauphin County setting aside the orders made by the Board in these two companion cases.

In the first case the Board, after a hearing and an election, made an order on November 21, 1957 certifying The Building Service Employees International Union Local No. 363, AFL-CIO as the exclusive representative of the employees of the appellees, Irving J. Friedberg, Mollye Friedberg and Lee B. Friedberg trading as Harrisburg Window Cleaning Company (hereinafter referred to as "employer"). The second case involved a decision and order of the Board which found that the same employer engaged in unfair labor practices within the meaning of the Pennsylvania Labor Relations Act of June 1, 1937, P.L. 1168, 43 P.S. 1211.1 *et seq.*, in the discharge of one of its employees. Following these decisions, the employer filed Petitions for Review of the Board's Final Orders in the Court of Common Pleas of Dauphin County. The court held that the Board had no jurisdiction over the employer and set aside the orders.

The facts are not in dispute. Employer is engaged in the furnishing of local window cleaning services in Harrisburg, Pennsylvania and employs five persons to do this work. Its total business for the year 1956 (the last full year prior to the institution of these proceedings) amounted to $40,165.70, of which $12,462.00 represented services performed for enterprises engaged in commerce within the meaning of the National Labor Relations Act and $28,003.70 represented services performed for purely intrastate customers. Of their customers engaged in interstate commerce only a few were in the production of goods or in the transportation industry. The others were mostly retail establishments.

The question presented by these appeals is whether the Pennsylvania Labor Relations Board has jurisdiction over this employer.

After recent decisions by the United States Supreme Court, it is unquestionable that where the activity of an employer affects or may affect commerce, State Labor Relations Boards do not have jurisdiction over a labor dispute. The field is pre-empted by the Federal Government which invested the National Labor Relations Board with exclusive jurisdiction. The exclusiveness exists even though the National Board refused to assert its jurisdiction because of its self-imposed standards. *Guss* v. *Utah Labor Relations Board*, 353 U.S. 1 (1957), which has been followed by this Court in *Hodges Bedding Co.* v. *Pennsylvania Labor Relations Board*, 388 Pa. 333, 131 A. 2d 93 (1957).

The term affecting commerce is defined as "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." 61 Stat. 137 (1947), 29 U.S.C. § 152 (7) (1952), 29 U.S.C.A. § 152 (7).

The question of whether a local employer, though not himself engaged in interstate commerce, who provides window cleaning services to buildings which house businesses engaged in such commerce is included within the commerce power of the Federal Government had been de-

cided in the affirmative in the only case involving this question by the United States Supreme Court. In *Martino v. Michigan Window Cleaning Co.*, 327 U.S. 173 (1946) the Court held that a window cleaning company's local intrastate work of cleaning windows on premises used by its customers in the production of goods for interstate commerce was an occupation *necessary* to the *production of goods* produced in those plants. This was a case interpreting the Fair Labor Standards Act of 1938 and the question was whether the employee of the window cleaner was working in a "process or occupation necessary to the production" of goods for interstate commerce. In 1949 Congress saw fit to amend the Fair Labor Standards Act so as to exclude local window cleaners from its coverage, 63 Stat. 911 (1949), 29 U.S.C. § 203(j) (1952) 29 U.S.C.A. § 203(j). In the House Report on this amendment it was specifically pointed out that the result in the *Martino* case provided coverage by the Act for employees in occupations which were *too remote* and *merely incidental to interstate commerce*. H.R. Rept. No. 1453, 81st Cong., 1st Sess., 14-15 (1949). The situation we are faced with here is also distinguishable from that in *Kirschbaum v. Walling*, 316 U.S. 517 (1942) and *Borden Co. v. Borella*, 325 U.S. 679 (1945). These were cases which arose under the Fair Labor Standards Act and the employees were engaged in general maintenance work, including operating elevators and making repairs, as opposed to only window cleaning. There is no other *judicial* authority for the proposition that this type of activity is included as interstate commerce. However, in 1955 the National Labor Relations Board without citing any authority decided that window cleaning for commercial and industrial establishments that were engaged in commerce would include the employer business as interstate commerce, *City Window Cleaning Co.*, 114 NLRB 906 (1955). It must be borne in mind that in this case the jurisdictional amount found by the Board was more than their established minimum. Although there is no doubt that the coverage of the National Labor Relations Act is considerably broader than the Fair Labor Standards Act, the *Martino* case and subsequent Congressional action taken as a

result thereof points out the remoteness of the effect that window cleaning has on interstate commerce. This being the case there seems to be a real question as to whether or not the activity of the employer is such that "affects commerce," but, even accepting the proposition that window cleaning of buildings involved in interstate commerce is an activity covered by the National Labor Relations Act, we still have the question of whether or not this particular employer's activity is not excluded for another reason.

While recognizing the broad grant of power under the NLRA, the United States Supreme Court has held that this jurisdiction is not without some limitation. Justice Stone in *NLRB* v. *Fainblatt*, 306 U.S. 601 (1939) said at 607:

> ". . . Examining the Act in the light of its purpose and of the circumstances in which it must be applied we can perceive no basis for inferring any intention of Congress to make the operation of the Act depend on any particular volume of commerce affected *more than that to which courts would apply the maxim* de minimis." (Emphasis supplied).

The *de minimis* doctrine has been adverted to on several occasions by the United States Supreme Court although it has not been called upon to take out this lower boundary. *NLRB* v. *Denver Building & Construction Trades Council*, 341 U.S. 675 (1951); *Amalgamated Meat Cutters and Butcher Workmen of North America, Local No. 427, AFL et al.* v. *Fairlawn Meats, Inc.*, 353 U.S. 20 (1957).

The court has never confirmed the jurisdiction of the National Labor Relations Board over an enterprise as small as the one involved in this case. We are not concerned here with the production of goods by the employer, but rather his activity was a service. All the cases in which the theory of *de minimis* has been asserted involved a question of amounts of goods produced or purchased. Now we have a case of a local window cleaner whose total yearly business is $40,165.70 of which only $12,462.00 even remotely has anything to do with interstate commerce. It is possible to say that every purely local business has some

no matter how slight an effect on interstate commerce. But, as Mr. Justice Frankfurter said in *Polish National Alliance* v. *National Labor Relations Board*, 322 U.S. 643 (1944), at 650: "Scholastic reasoning may prove that no activity is isolated within the boundaries of a single State, but that cannot justify absorption of legislative power by the United States over every activity." The present case would seem to be one to which Justice Frankfurter was alluding. Here the business of the employer is so small, so trivial, and so insignificant that if the courts do not characterize this business as *de minimis* then that doctrine has no meaning.

Also, if we were to uphold the decision of the lower court, this case would then be in what Chief Justice Warren in the *Guss* case, supra, characterized as "no man's land". We would have a business whose volume would not qualify under the jurisdictional minima established by the National Labor Relations Board and yet be entirely unregulated since the State Board could not exercise any jurisdiction over it.

The appellee also argued that the *de minimis* doctrine applies to the volume of commerce that is affected and since the employer washes the windows of a building occupied by the Pennsylvania Railroad and several other companies engaged in interstate transportation, that this is not *de minimis* since their volume of business greatly exceeds anything that could even be thought of to be trifles. This is not a valid argument. As has been pointed out before, the employer's business was remote and incidental. The appellees urge us to envision a situation where the interstate transportation carried on by these companies is simultaneously tied up because of a labor dispute with the instant employer who is an independent contractor. The only situation which could bring about this type of tie-up would be one in which the employer, having a disagreement with his unionized employees, employs nonunion men to perform the work on these various companies' windows and the employees in turn were to picket the jobs. Aside from this possibility being very remote, there need not be any tie-up because there is nothing in the record which

shows that the railroad and the other companies could not engage another window cleaner contractor, thereby ending any right of employer's union employees to picket these areas. Even so, labor disputes are not interminable; usually they are resolved within a comparatively short time. The effect that uncleaned windows will have on commerce pending settlement of the dispute is at most negligible.

As was stated before, since any local business could be said to have an *effect on commerce*, in order to give more than mere lip service to the *de minimis* doctrine a line must be drawn somewhere. In this case the type of business and the facts are such as to clearly indicate that the National Labor Relations Board does not have jurisdiction and hence the Pennsylvania Labor Relations Board was within its authority in making its ruling and orders.

Orders reversed.

Mr. Justice Bell and Mr. Justice Benjamin R. Jones concur.

APPENDIX B

The pertinent text of the statutes involved

Section 7(c) of the Act of the General Assembly of Pennsylvania of June 1, 1937, P. L. 1168, as amended by the Act of June 9, 1939, P. L. 293, 43 Purdon's Pennsylvania Statutes Annotated 211.7(c)

(c) Whenever a question arises concerning the representation of employes the board may, and, upon request of a labor organization, or an employer who has not committed an act herein defined as unfair labor practice, or any group of employes in an appropriate unit representing by petition thirty per centum or more of the employes of that unit, shall investigate such controversy and certify to the parties, in writing, the name or names of the representatives who have been designated or selected. In any such investigation, the board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section eight, or otherwise, and may utilize any suitable method to ascertain such representatives, except that if either party to the controversy so requests, a secret ballot of employes shall be taken within twenty days after such request is filed. Any certification of representatives by the board shall be binding for a period of one year, or for a longer period if the contract so provides, even though the unit may have changed its labor organization membership.

National Labor Relations Act, 49 Stat. 449 et seq. as amended by the Labor Management Relations Act, 1947, 61 Stat. 136 et seq., 29 USC 151 et seq.

Section 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c)

materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging

the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Section 2. When used in this subchapter—

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

Section 9 (c) (1). Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section; the Board shall investigate such petition and if it has reasonable cause to believe that a question

of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.